PPG Industries, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW. Case 25–CA–25475

August 13, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On September 30, 1998, Administrative Law Judge Richard H. Beddow Jr. issued the attached initial decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief. On August 24, 1999, following a remand by the Board, the judge issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decisions and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified,[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER LIEBMAN, dissenting.

This case involves the discipline of a male union supporter who shouted to an allegedly underpaid female coworker:

> They're f—ing you. They're screwing you. You need to sign one of my [union authorization] cards.

The remark can fairly be described as vulgar. But no reasonable person—no person of ordinary sensitivity, familiar with colloquial speech—would hear in the remark a sexual connotation, much less a connotation so strong as to constitute incipient sexual harassment. Unlike my colleagues, then, I cannot conclude either that the male employee here lost the protection of the Act (under the test of *Felix Industries*, 331 NLRB 144 (2000)) or that the Employer has established that its antiharassment policy supports the discipline imposed (under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983)). I therefore dissent from the dismissal of the complaint.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree with the judge's conclusion that the Respondent lawfully disciplined alleged discriminatee John Sharber after employee Julie Meeks complained that Sharber had made vulgar, sexually explicit remarks to her on June 27, 1997. We find that both the analysis in *Felix Industries*, 331 NLRB 144 (2000), remanded 251 F.3d 1051 (D.C. Cir. 2001), and the analysis in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), support this conclusion.

Raifael Williams, Esq., for the General Counsel.
Lynne Schmidt Bianconi, Esq., of Pittsburgh, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Evansville, Indiana, on September 10, 1998. The proceeding is based upon a charge filed July 9, 1997, by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO. The Regional Director's complaint dated December 23, 1997, alleges that Respondent PPG Industries of Evansville, Indiana, violated Section 8(a)(1) and (3) of the National Labor Relations Act by issuing written discipline to and suspending employee John Sharber because of his union or other protected concerted activities and to discourage employees from engaging in these activities.

Ruling on Motion for Summary Judgment

The General Counsel rested after calling the Respondent's personnel supervisor, the alleged discriminatee, and one employee witness. The Respondent then requested an opportunity to move for summary judgment. The request was granted and after a brief recess the Respondent made an oral Motion for Summary Judgment and presented an argument in support. The General Counsel gave an answering argument and in accordance with the provisions of Section 102.35(8) of the Board's Rules and Regulations, I gave an oral summation of the record and ruled on the record that the Respondent's Motion for Summary Judgment would be granted and the complaint would be dismissed. No other procedural requests were made and it was announced that my oral ruling would be supplemented by written documentation.

Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the manufacture, distribution, and sale of automobile windshields at its Evansville plant and it admits that at all times material is and has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the

Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

John Sharber has been employed as a forklift operator for over 10 years. The Union conducted an organizational drive in 1995, which Sharber actively supported by handing out authorization cards, handbilling, and holding meetings at his home. An election was held, however the Union failed to gain majority support and after objections were dismissed the results were certified. At that time Sharber signed another authorization card in front of management officials to show his continued sympathies towards the Union. He thereafter engaged in no overt activity until February 1997, when he began to circulate and seek signatures for a petition (the petition was not presented as an exhibit or otherwise described in detail).

The Respondent is shown to have posted three separate notices after the election which related to the union drive, the second of which spoke about putting past differences behind and the last which asked that employees not sign any new authorization cards.

On July 7, 1997, the Respondent questioned employee Sharber about a complaint made against him by another employee which alleged the use of profane and offensive words and phrases which could imply her involvement in sexual activities. At the hearing Sharber maintained that he used the word "screwing" rather than "fucking" but he otherwise admitted to making a statement that he asserted was just "shop talk." I find however that his comments clearly could be considered by the Respondent to be in the category of sexual harassment. The Respondent's investigation found support for the victim's complaint in one eyewitness who corroborated her story and, in accordance with its handbook and its disciplinary rules, it thereafter disciplined employee Sharber by issuing him a written final warning. It further provided that Sharber be given a paid "decision day" in which to decide if he would commit to abide by the Respondent's plant rules. When Sharber produced an unacceptable letter of commitment on July 8 (which did not address harassment), he was given an additional unpaid "decision day" to produce an acceptable letter of commitment which he did on July 9.

III. DISCUSSION

For the reasons stated on the record and as supplemented herein, I find that the evidence is insufficient to sustain the General Counsel's burden of proof, that the presentation of witnesses or further evidence by the Respondent is unnecessary and that summary judgment in the Respondent's favor is warranted. Accordingly, I find that dismissal of the complaint in response to that motion will be consistent with the purpose of the Act, with applicable law and with the appropriate utilization of the resources of the Board and of the parties.

Under the criteria set forth in *Wright Line*, 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the General Counsel must make a showing sufficient to support an inference that the employees' union or protected concerted activities were a motivating factor in Respondent's subsequent decision to take disciplinary action.

Here, the mere fact that Sharber actively supported the union drive in 1995 appears to be the prime evidence of any basis for finding antiunion motivation. The fact that the employer opposed the union drive does not itself show animus and here there is no showing that it engaged in any activities at that time that otherwise were in violation of the Act. The timing of the discipline is not shown to be related to anything done by Sharber that was connected to union activity and there is no evidence showing the nature of the "petition" he circulated or that management was aware of the "petition" or of Sharber's involvement with it. Moreover, the discipline was confidential and was not disclosed to other employees, therefore it could not have been for the alleged purpose "to discourage other employees from union activity." There is evidence that the employer posted three notices after the election but one of them, in October 1996, speaks to putting past differences "behind" and the last one, in March 1997, asks only that the employees not sign any new authorization cards. This is insufficient to show animus or antiunion motivation. Clearly, the employer otherwise was obligated to seriously consider an employees' complaint regarding a matter related to sexual harassment and it acted in a nondiscriminatory manner with a reasonable investigation, evidence of a supporting witness, and in accordance with its handbook and regular disciplinary policies. The initial "decision day" of suspension was with pay and it was only after Sharber failed to comply with the opportunity to commit to future compliance with plant rules that he was suspended for one unpaid day.

Accordingly, there is no persuasive reason to infer animus or improper motivation and for these reasons and those stated at the hearing, I find that the General Counsel has failed to meet his initial burden.

Under these circumstances, I find that the exhibits and the testimony, especially that of personnel supervisor, Alice Williams, also are sufficient to shown that the Respondent had valid reasons for giving a written warning to John Sharber and for giving him a 1-day unpaid suspension; that it acted in response to a serious employee complaint involving an issue in the nature of sexual harassment, that its actions were not disparate or pretextual in nature and that it responded to persuasive, legitimate concerns that would have resulted in the same course of action regardless of any union or other protected activity on the part of the alleged discriminatee. See *Jordan Marsh Stores Corp.*, 317 NLRB 460, 476 (1995). Accordingly, I find that no violation of the Act occurred and I conclude that the General Counsel has failed to prove that the Respondent violated Section 8(a)(1) and (3) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent PPG Industries, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The complaint is dismissed in its entirety.

Raifael Williams, Esq., for the General Counsel.
Lynne Schmidt Bianconi, Esq., of Pittsburgh, Pennsylvania, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Evansville, Indiana, on September 10, 1998, and April 22, 1999. The proceeding is based on a charge filed July 9, 1997, by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO. The Regional Director's complaint dated December 23, 1997, alleges that Respondent PPG Industries of Evansville, Indiana, violated Section 8(a)(1) and (3) of the National Labor Relations Act by issuing written discipline to and suspending employee John Sharber because of his union or other protected activities and to discourage employees from engaging in these activities.

After the General Counsel presented his case in chief and rested, the Respondent requested an opportunity to move for summary judgment. The request was granted and after a brief recess the Respondent made an oral Motion for Summary Judgment and presented an argument in support. The General Counsel gave an answering argument. No other procedural requests were made and it was announced that my oral ruling granting the motion would be supplemented by a written documentation, which was issued as a Decision dated September 30, 1998.

On January 21, 1999, the Board vacated the decision on the Motion for Summary Judgment and issued an Order, which remanded this proceeding to me for further proceedings. At the further hearing on April 22, the Respondent called Personnel Supervisor Alice Williams who previously was called as an adverse witness by the General Counsel as well as employee Julie Meeks (who, as found below was the victim of sexual harassment by the alleged discriminatee), her Acting Supervisor Charles (Brad) Lamar who witnessed the incident, Lewis Palka, the former (until November 1998) production supervisor at the Evansville plant, and Chris Faria, a former (until mid-1997) human resources manager at Evansville. When the Respondent rested, the alleged discriminatee, John Sharber, was recalled by the General Counsel and testified very briefly. Subsequently, briefs were filed by the General Counsel[1] and the Respondent.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the manufacture, distribution, and sale of automobile windshields at its Evansville plant and it admits that at all times material is and has been an employer engaged in operations affecting commerce within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

My initial evaluation of the record resulted in the following recitation of fact in my ruling on the Motion for Summary Judgment set forth in my decision dated September 30, 1998:

> John Sharber has been employed as a forklift operator for over 10 years. The Union conducted an organizational drive in 1995, which Sharber actively supported by handing out authorization cards, handbilling, and holding meetings at his home. An election was held, however the Union failed to gain majority support and after objections were dismissed the results were certified. At that time Sharber signed another authorization card in front of management officials to show his continued sympathies towards the Union. He thereafter engaged in no overt activity until February 1997, when he began to circulate and seek signatures for a petition (the petition was not presented as an exhibit or otherwise described in detail). The Respondent is shown to have posted three separate notices after the election which related to the union drive, the second of which spoke about putting past differences behind and the last which asked that employees not sign any new authorization cards.

On July 7, 1997, the Respondent questioned employee Sharber about a complaint made against him by another employee, which alleged the use of profane and offensive words, and phrases, which could imply her involvement in sexual activities. At the hearing Sharber maintained that he used the word "screwing" rather than "fucking" but he otherwise admitted to making a statement that he asserted was just "shop talk." I find however that his comments clearly could be considered by the Respondent to be in the category of sexual harassment. The Respondent's investigation found support for the victim's complaint in one eyewitness who corroborated her story and, in accordance with its handbook and its disciplinary rules, it thereafter disciplined employee Sharber by issuing him a written final warning. It further provided that Sharber be given a paid "decision day" in which to decide if he would commit to abide by the Respondent's plant rules. When Sharber produced an unacceptable letter of commitment on July 8 (which did not address harassment), he was given an additional unpaid "decision day" to produce an acceptable letter of commitment which he did on July 9.

In its remand Order the Board refers to "the Respondent's record of the investigatory interview it conducted with employee Julie Meeks and the testimony of Sharber about the conversation with Meeks that led to the investigation and Shar-

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[1] The General Counsel's unopposed motion to correct transcript dated May 26, 1999, is granted and received into evidence as GC Exh. 16.

ber's discipline support the General Counsel's position as evidence that possibly could support the General Counsel's burden" under *Wright Line*, infra. In its exception the General Counsel referred to Sharber's testimony that his comment to Meeks was:

> Julie, they are screwing you again. If us people at PPG would stick together and get a contract with our company we could solve some of our problems.

The General Counsel also refers to Sharber's testimony in which he states that when the matter was investigated by Williams she assertedly told him:

> I'm not too concerned about the profanity language that you supposedly used but I am about the Union authorization cards you have been harassing Julie about signing.

In its answer to the exceptions the Respondent pointed out that contrary to exception 7, Sharber in fact was interviewed prior to being disciplined and that when he had the opportunity to tell his version of events he accused others of lying but never told the Respondent's supervisors what he allegedly had said, as he later testified to at the hearing.

Here, I specifically find that Sharber's testimony regarding what he allegedly said to Meeks is untruthful and that his assertion that Williams said she was concerned about authorization cards, not profane language, is patently false. Williams described the Respondent's investigation with a straightforward demeanor and in a highly believable manner and I find that her testimony of what was said or not said, including the existence of corroboration of Meeks' complaint by Acting Supervisor Lamar, should be credited over Sharber's self-serving testimony. Otherwise, my observation of Sharber's demeanor on both the September and April hearing dates led me to make a note that his responses to Respondent's questions were evasive and his manner left me with the conviction that he would singlemindedly insist on placing events in the light most favorable to what he wanted, regardless of what actually might have occurred. Accordingly, I find he was not a credible witness and where statement of facts are set forth herein I rely on the more trustworthy testimony of other witnesses where conflicts occur.

Facts Presented on Further Hearing

In its drect case Respondent's personal supervisor, Williams, reiterated the information she presented as an adverse witness and persuasively described her observations and participation in the events surrounding Sharber's discipline.

After Supervisor Jackie Debes contacted her about Meeks' harassment complaint on June 27, just prior to the weeklong July 4th plant shutdown, Williams recalled two prior incidents involving Sharber and she reviewed his file on her return to work on July 7. She also met with Area Supervisor Debes and Production Superintendent Palka and reviewed Meeks formal complaint. Sharber's discipline record showed that he had been counseled twice before on February 22 and October 13, 1995, for threatening or harassing behavior (and once on November 7 for violating the Respondent's no-solicitation policy), and had no currently active discipline as of June 1997. In the meeting Debes also described an earlier incident where something happened on her line where he had made some inappropriate comments to another female employee and Debes had informally talked to him about it. She also recalled that at the time Sharber had the nickname "Wo, Baby," because of his comments to women.

As established at the initial hearing, Sharber thereafter was interviewed by Williams, Palka, and Debes on July 7, shortly after he reported for work on the evening shift. Williams handed Sharber Meeks' written complaint and said that the language was so offensive she did not want to repeat it. Williams told Sharber that she was concerned if he thought that was an acceptable way to treat women in the workplace (a statement that is completely inconsistent with Sharber's unbelievable claim that she said she was not concerned about profanity but about authorization cards). Williams testimony was fully corroborated by former Production Superintendent Palka (who now holds the position of advance production manager at the Respondent's general office in Pittsburgh), who opened the meeting, and Respondent's contemporaneous notes of the event. I find that Sharber then denied using the more profane phrasing and claimed the others were lying but he did not at that time assert he has used any other words or phrases about everyone sticking together to get a contract, or anything similar.

When Williams brought up his history of prior harassment in 1995, he said one complainant had lied and that he had stopped making harassing phone calls to other employees after Human Resources Manager Faria had talked to him. Faria, who currently is manager of human resources at the Respondent plant in Delaware, Ohio, returned to Evansville for the continued hearing and confirmed his participation in, and the existences of Sharber's prior discipline for harassment. It was noted that the discipline in October 1995, occurred shortly after the Union lost a representation election when Sharber made repetitive harassing phone calls to the home of another employee who thereafter complained to management. An unfair labor practice charge over this warning was dismissed by the Regional Director.

Williams told Sharber she was sorry but that she didn't believe him and that because of his past history, she was giving him a written final warning (which she read and explained), and a paid "decision day" to prepare a letter of commitment. As established at the initial hearing, his effort to write such a letter was not accepted and he was given a second, but unpaid day in which to comply, upon which he produced a minimally acceptable effort and was returned to work.

In his first effort to write the required letter of commitment, Sharber suddenly attempted to wrap himself in a protective "union" flag by writing as follows:

> —I HAVE NEVER HAVE ANY PROBLEM COPERATING WITH MANAGEMENT IN DOING MY JOB AND WHAT IM TOLD TO DO. I WILL CONTINUE TO BE PRODUCTIVE AND ADHERE TO ALL PLANT RULES. HOWEVER, I AM BEING ACCUSED OF THINGS THAT I AM ABSOLUTELY NOT GUILTY OF. THIS IS AMERICA AND I HAVE THE RIGHT TO FACE MY ACCUSERS.
>
> DOES NOT THE CONSTITUTION OF THE UNITED STATES OF AMERICA APPLY IN THIS CASE?

> MRS. WILLIAMS WANTED ME TO PUT IN THIS LETTER THAT I WILL NOT USE FOUL LANGUAGE IN THE FUTURE. I HAVE NEVER USED FOUL LANGUAGE TO ANYONE ANYWHERE INSIDE THIS PLANT OR OUTSIDE EXCEPT FOR SHOPTALK WHICH EVERYONE IN HERE USES. DOES THIS MEAN THERE IS GOING TO BE A TOTAL BAND OF TALKING IN THIS WORKPLACE? IF SO, I WILL ADHERE TO COMPANY POLICY. I HAVE ALWAYS DONE MY JOB, AND NEVER HAD ANY PROBLEMS UNTIL I BECAME AN OPEN ACTIVATE AND SUPPORTER OF THE U.A.W. ALL OF THESE ALLEGATIONS THAT HAVE BEEN LEVELED AGAINST ME ARE A PRETEXT FOR MY UNION ACTIVITIES.—

Despite his obvious awareness at this time of the possible significance of union activity, he continued to fail to give any explanation of what he might have said and it was not until his testimony at the hearing that the Respondent was made aware of his alleged additional comments. Otherwise, I find that the tenor of Sharber's letter is consistent with my independent observation of his demeanor and his argumentative propensity to be evasive, to engage in misdirection and to avoid being fully truthful.

Shortly before the closing of the hearing, the Respondent's next to last witness gave a shred of support to the General Counsel's case when Acting Supervisor Lomar testified that he was 15 to 20 feet from Meeks and Sharber and that he recalls that Sharber pulled by on his forklift and said, "They're f—ing you, they're screwing you. You need to sign one of my cards." Lamar further testified that Meeks and Sharber "talked just a brief little bit" and then Meeks came to him and appeared to be visibly upset. He then attempted to calm her down and asked her if Sharber talked to her like that a lot and when she answered that he had harassed her quite a bit he suggested she take the matter up with Supervisor Debes. Lamar specifically answered that Sharber did not make any comment about people sticking together to get a contract and solve problems, as asserted by Sharber and that Sharber said *both* "they're fucking you" and "they're screwing you."

Later, Lamar spoke with Debes about what had occurred. Superintendent Palka then spoke with Meeks and Debes and his notes indicate that he was told the following:

> Julie was in potting on Mon-Tues-Wed-Thur and part of Friday. Julie was reassigned as a potting material handler to a fork truck driver at Final. John was on a fork truck and loudly shouted "you got fucked again." The intent of the comment was that Julie was being reassigned to a driving job and should be paid a JC4 rate. Julie felt this was harassment since many times John has been insistent on her signing a union card.
>
> Several times this week at the potting line, John asked Julie for her "signature" on his union card. She clearly stated no interest in the union.
>
> John does not normally talk to Julie unless it is union related.
>
> Julie has gone to Jackie Debes on another occasion to relate a similar event. Today, the harassment upset Julie very much, especially the vulgar language. Brad Lamar, #8 area supervisor, overheard the vulgar comment.

Otherwise, there is no indication that Lamar ever told supervisors Debes and Palka about Sharber's additional words about signing "one of my cards."

Williams also testified regarding the Respondent's rules, how they applied to Sharber's conduct and how the Respondent does not condone harassment of any kind and takes very seriously any complaints of harassment of any kind and takes very seriously any complaints of harassment. The applicable employee handbook policy to its employees includes:

> Equal Employment Opportunity
>
> Item 7A-2: "PPG Industries has pledged to create and maintain a workplace that is free of harassment due to sex, race, color, creed, religion, national origin, citizenship status, age, disability, or veteran status. An employee who feels that he or she is a victim of harassment can obtain prompt, appropriate Company action by notifying any member of management."
>
> J. The Company is committed to maintaining a working environment free of all forms of harassment including verbal or physical abuse or intimidation against any person on the basis of race, color, creed, sex, religion, national origin, age, disability or veteran status.
>
> Workplace Violence
>
> Item 13A-2: To take prompt remedial action up to and including immediate termination, against any employee or who uses any obscene, abusive, or threatening language or gestures";
>
> Rules for Employee Conduct
>
> Item 10-1: Although most of you will not need to be reminded of them, it is necessary to spell out these rules and regulations which, if violated, may result in disciplinary action.
>
> It is not intended that this list is all inclusive, but merely suggestive of certain areas which would be subject to disciplinary action up to and including immediate termination.
>
> Item ID-2: F. General conduct: Includes obscene, abusive, discriminatory, or threatening language, fighting, interference with other employees, engaging in malicious gossip, posting material without prior approval, immoral behavior or engaging in such conduct that adversely affects the morale of other employees.
>
> Discipline Procedure
>
> Item 6-D-1: Normally, discipline will be progressive in nature. However, there are certain violations of a deliberate nature or actions, which constitute such serious violations that immediate review and termination may be necessary.

Williams also testified to four incidents in which Evansville employees harassed female employees and were disciplined. Each of the four incidents was an isolated event, not part of a pattern, and the offenders were counseled or given a verbal warning.

Discussion

Here, the General Counsel has shown that union activity took place at the Respondent's facility in 1995, that Sharber was a known union supporter and that in 1996 after the Union loss of the election was certified, the Respondent posted several notices which asked that past differences be put behind and that employees not sign new authorization cards. At the initial hearing the records established by the General Counsel also indicated that in February 1997 Sharber circulated and sought signatures for a petition, however, at the further hearing it became apparent that Sharber also was circulating new authorization cards (despite instructions from the Union to stop seeking cards and to concentrate on the petition), and that he had repeatedly asked a new female employee, Meeks, to sign a card, despite her rejections of his efforts. The record also shows that Respondent has a valid no-solicitation rule and applicable handbook disciplinary rules, that Sharber twice previously had been disciplined for harassment of other employees, that Sharber was given a final warning under these rules because he had used vulgar profanity of a sexual nature to a female employee, and that the Respondent relied upon credible evidence showing that despite his denial, Sharber had used the most vulgar terminology attributed to him rather than (or in addition to) the less vulgar but equally sexually suggestive term he admitted to using.

Here, the General Counsel takes the apparent position that sexual harassment and the use of vulgar profanity is a protected concerted activity which grants the perpetrator immunity from discipline as long as the perpetrator at some time has been a known union supporter and might also have said something about people striking together to solve problems at the time he engaged in his sexually vulgar conduct.

The General Counsel's concept of the case and his attempted reliance upon *Burnup & Sims*, 379 U.S. 21 (1964), is misplaced and clearly the more contemporaneous and accepted standard for review of a case of this nature is *Wright Line*, 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), which requires that the General Counsel must make a showing sufficient to support an inference that the employees' union or protected concerted activities were a motivating factor in Respondent's subsequent decision to take disciplinary action. Here, the alleged discriminatee even admits that he engaged in some level of misconduct (saying that "they are screwing you again"), and the preponderance of the evidence shows that he actually used more vulgar phrasing in a manner that constituted sexual harassment and violated the Respondent's valid plant handbook rules. Moreover, the record initially (as well as after further hearing), lacks believable proof that the Respondent was aware that he said something about signing one of my cards at the time it gave him a final warning.[2]

[2] In *Burnup & Sims*, the court held that Sec. 8(a)(1) is violated if: (1) the discharged employee is engaged in protected activity; (2) the employer knew the activity was protected; (3) the basis of the discharge was alleged to be an act of misconduct in the course of the activity; and (4) the employee was not, in fact, guilty of that misconduct. All four are required for *Burnup & Sims* to apply and that is not the case here.

The Board has accepted a *Wright Line* analysis in numerous cases, several of which will be noted here. In *Food & Commercial Workers Local 1776*, 325 NLRB 908 (1998), Judge Miller, in a Bench Decision, noted a showing of remote union activity but found no animus and no unlawful action. In *Meritor Automotive*, 328 NLRB 813 (1999), Judge Carson found marginal knowledge of union activity but no direct evidence of animus and no basis to infer animus (no disparate treatment), and therefore a failure to meet the General Counsel's burden of proof. Also, in *Birmingham Chrysler Plymouth Jeep Eagle*, 326 NLRB 1175 (1998), Judge Wallace (without even citing *Wright Line*), in a brief, two-page decision, found no protected activity, no evidence of animus, and, arguendo, a valid nondiscriminatory basis for the employee's discharge. It is noted that in the latter case, while the charging party filed exceptions, the General Counsel apparently recognized the absence of even marginal proof or any basis for successful review and accepted the judge's dismissal of the complaint.

First, the subject of protected concerted activity. Clearly, Sharber had the Section 7 right to ask other employees to sign authorization cards. As pointed out above, he failed to inform the Respondent that that was what he allegedly was doing when he accosted employee Meeks and this court was initially told that he had been circulating a petition at a prior time. If in fact he was seeking her signature on an authorization card when he made his vulgar opening remark, when both were on work time, he would have been violating the Respondent's valid no-solicitation rule and could properly have been disciplined for violating that rule. He also would have been violating the Union's instructions that he forego card signing. Here, I otherwise find that the Respondent's choice to disregard this solicitation factor is indicative of its lack of knowledge and indicative of an absence of union animus. The General Counsel cites *Circle K Corp.*, 305 NLRB 932 (1991), in which the Board reversed my conclusion that an employee's actions were only in her own interest and found that her letter to other employees about working conditions was the sole motivating factor for her discharge. The Board also found that the activity was concerted and demonstrated a violation of Section 8(a)(1) but it did not pass on my conclusions regarding any 8(a)(3) violation. Clearly, the record involving Sharber shows that the Respondent's reaction to alleged sexual harassment in the workplace was at least another motivating factor and therefore it is not the same as *Circle K*, supra. Accordingly, a *Wright Line* analysis is appropriate.

The General Counsel goes on to site *Consumers Power Co.*, 282 NLRB 130 (1986), and *Neff-Perkins Co.*, 315 NLRB 1229 (1994), cases in which the Board upheld two of my decisions in which I found that the employee's insubordinate conduct was part of the res gestae of a protected activity and not so egregious as to take it outside the protection of the Act. In the latter case employees used the terms "shitty" and "sucks" in front of a customer who was present at a workplace meeting.

Here, the Respondent's investigation developed some information showing that in addition to the sexually vulgar occurrence on June 27, Sharber previously had repeated and insistently harassed Meeks about signing a union card. It does not appear, however, that any past lawful conduct was part of the

res gestae of Sharber's sexually vulgar statement to Meeks, made in Lamar's presence. Until Lamar's testimony at the further hearing, there was no credible evidence that any concurrent protected activity had occurred. Now, taking into consideration Lamar's testimony that Sharber followed his obscene comment with the phrase "you need to sign one of my cards," it appears that Sharber, in effect, made a conscious or unconscious attempt to make a protected activity part of the res gestae of his thoughtless, obnoxious, unprotected verbal assault on Meeks. Sharber's vulgarities are words that were a clear violation of the Employer's handbook rules against use of "obscene, abusive, or threatening language"; "conduct that adversely affects the morale of other employees"; or "exhibited attitude that adversely affects team effort, morale, and attainment of organizational goals." Sharber's use of vulgar language, directed at a young female employee, qualifies as an actionable offense under the Employer's handbook rules. His language and vulgar presentation also is beyond the concept of acceptable "shop talk" and it constitutes sexual harassment in the workplace, conduct that an employer is required to address in order to protect the victims' rights to a hostile free work environment. Accordingly, I find that it is egregious conduct that is unprotected.

Sharber's vulgar comment initiated the confrontation, it was not a defensive reaction as in *Consumers Power*, supra, and it is not res gestae or a spontaneous declaration made immediately after an event. I heard the testimony and evaluated the witnesses' demeanor in the *Consumers Power* case (and *Neff-Perkins)*, supra, and saw a situation where concerted conduct was responded to by an employer, which generated a defensive reaction by the employee who was then disciplined. My observations of the circumstances and Sharber's testimony in this case lead me to conclude that the situations are not at all comparable with the cited cases and I find that Sharber was not attempting to have Meeks sign an authorization card or was he engaging in any other protected activity when the event occurred.

Viewing the occurrence in the light most favorable to Sharber, he crudely started a conversation intending to allude to Meeks' job assignment. Meeks initially did not understand it that way and reasonably believed that he was making an unwarranted public and profane commentary about her sexual activities. Previously, Meeks clearly had informed Sharber that she was not interested in signing an authorization card and Sharber's conduct in this final instance could arguably be seen as an example of abusive retaliatory harassment on Sharber's part because of her repeated spurring of his advances. This interpretation, however, would not provide a valid defense for the conduct.

Meeks' rights to be free of harassment and the Respondent's responsibility to provide a proper workplace and to respond to her complaint in accordance with its rules and policies must be balanced against Sharber's Section 7 rights but the latter must yield when those rights are used as a pretext for sexually vulgar behavior or where the rights are exercised in such a way that the action violates common standards of decency. As otherwise concluded above, the overwhelming preponderance of evidence shows that the conduct, which precipitated his discipline, was not concerted activity that should be protected under the Act.

This case also is strikingly clear in relation to the element of animus, a deciding factor in the several cases cited above. Here, the General Counsel contends that Sharber was active in passing out cards and wearing union paraphernalia prior to the election held in 1995 and that the Respondent displayed "hostility" toward the Union by telling employees it didn't need a third party to help it operate and also points to the notices, described above, the Respondent's posted after the election was lost by the Union. As stated in the *Birmingham Chrysler* case, supra, opposition to unionization is insufficient in itself to establish animus. Moreover, there were no successful objections or charges relative to any violation of the Act by the Respondent in that election. In fact, a charge arising out of prior disciplinary action for harassment by Sharber was dismissed and no other improper conduct was found to have occurred involving Sharber or any other union advocate.

The General Counsel seeks to infer animus in the fact that the Respondent responded to Meeks' complaint and interpreted the situation as being one of sexual harassment. Contrary to the General Counsel, there is nothing in the record that would somehow twist the employer's response to a facially valid display of vulgar, sexually explicit language into something that was pretextual. In fact, the employer responded in a markedly restrained manner. There was no rush to judgment. There was no attempt to discipline Sharber for his possible rule violation of soliciting on worktime. There was no overly harsh penalty imposed (no suspension or discharge) and he was given a day off *with pay*, to prepare his initial letter of commitment and was given a reasonable chance to bring his behavior into compliance with its rules and expectations. This is not conduct from which animus can be inferred. If anything should be inferred, it would be that the Respondent's managers acted in a responsible manner and displayed no antiunion animosity.

Finally, the General Counsel contends that the Respondent's choice of a final warning displays a failure to follow its disciplinary guidelines and therefore requires an inference of animus. The General Counsel also suggests disparate treatment because Manager Palka, in accepting Sharber's second letter of commitment, expressed several conditions.

The Respondent's rules, however, unambiguously state that actions that constitute serious violations may be handled outside of the normal progressive system. Its rules also provide for prompt action, including termination for obscene, abusive language and its expressed policy (which would track its obligation under Federal regulations other than the National Labor Relations Act), calls for a workplace free of verbal abuse and all forms of harassment. Certainly, in view of the nature of the offense and especially in view of Sharber's history of past harassing conduct, discipline did not have to follow the normal progression and the Respondent appropriately imposed discipline outside of the normal steps. Accordingly, there is no basis to infer animus.

Supervisor Palka did remind Sharber on July 9 to abide by existing plant rules but these instructions concerned standard plant rules. Handbook item 1-D-1 alludes to the proposition that most employees will not need "to be reminded" of the rules

and thus it was appropriate under the circumstances, including Sharber's minimally acceptable letter of commitment, and it does not demonstrate animus. Moreover, Palka's reminder would appear to be a measured action designed to alert Sharber and to keep him free of other rule violations that could jeopardize his continued employment. In short, the Respondent's conduct under the circumstance was clearly helpful and balanced and cannot be conjectured into an inference of animus.

In summation, I find that the record completely fails to indicate any probative basis for finding that the Respondent's action in giving Sharber a final warning because of his conduct was motivated by any reason other than an investigation of another employee's complaint and a reasonable conclusion that he had committed a serious violation of plant rules and policy. I find that there is no direct showing of possible animus and there is nothing beyond speculation that possibly could suggest a valid basis for inferring animus. I also find that there is no showing that at the time of the discipline was imposed the Respondent even was aware that Sharber claimed to have been or was engaged in protected conduct when he engaged in his improper and indecent confrontation with a female employee who thereafter complained about his obscene and offensive behavior. I find that Sharber's conduct was egregious and it was not part of the res gestae of possible connected protected activity. Finally, I find that on balance the Respondent's duty to act on behalf of the victims' rights to a harassment free workplace outweighs any tenuous indication that Sharber was engaged in a protected activity. Accordingly, I find that the only reason for Sharber's discipline was his misconduct. As the record fails to show that he was disciplined for any other reason, the General Counsel has failed to meet his initial burden under *Wright Line*, supra.

In my decision and ruling on Motion for Summary Judgment I reached the same ultimate conclusion noted immediately above and also made the following finding:

> Under these circumstances, I find that the exhibits and the testimony, especially that of personnel supervisor, Alice Williams, are sufficient to shown [sic] that the Respondent had valid reasons for giving a written warning to John Sharber and for giving him a one day unpaid suspension; that it acted in response to a serious employee complaint involving an issue in the nature of sexual harassment, that its actions were not disparate or pretextual in nature and that it responded to persuasive, legitimate concerns that would have resulted in the same course of action regardless of any union or other protected activity on the part of the alleged discriminatee, see *Jordan Marsh Stores Corp.*, 317 NLRB 460, 476 (1995). Accordingly, I find that no violation of the Act occurred and I conclude that the General Counsel has failed to prove that the Respondent violated Section 8(a)(1) and (3) of the Act, as alleged.

Although, I did not use the phrase "even assuming arguendo" that Sharber engaged in protected activity, as was the case in the *Birmingham Chrysler* case, supra, it was intended that the paragraph constitute an alternative finding and I here reaffirm my conclusion in this respect.

On further hearing the record is even clearer that the discipline of which Sharber complains is typical of that issued for similar violations of Respondent's policy involving other employees. Williams testified to four incidents in which Respondent's Evansville employees harassed female employees and were disciplined. Each of the four incidents was an isolated event, not part of a pattern, and the offenders were counseled or given a verbal warning (as was Sharber himself on previous occasions). Accordingly, I again conclude that the overwhelming weight of the evidence precludes the possibility of reaching the speculative inferences suggested by the General Counsel and I find that the overall record and the evidences of the Respondent's practices show that the Respondent would have issued a final warning to Sharber even in the absence of any arguable protected concerted and union activity.

Additional Matters

The Union properly fulfilled any duty it had by acting on Sharber's complaints and filing a charge on his behalf. It is equally clear that the Union recognized that any record subsequently developed was inconsistent with a viable showing of an actual violation of the Act and it responsibility did not pursue the matter further.

Because I initially chose to avoid specifically stating that Sharber's testimony about what he said was false, the General Counsel has apparently seen an opportunity to make an extremely strained attempt to salvage a record that was overwhelmingly insufficient to counterbalance the facts presented which clearly favored the Respondent's position, both as to motivation and discipline that would have issued despite any of Sharber's prior union activities.

Here, there may have been a valid reason to investigate and to proceed to litigation, however, at the close of the General Counsel's case it should have been clear that the objective possibility of finding substantial evidence or drawing reasonable inferences that would support a finding of illegal conduct was inconsistent with the preponderance of the record and was so remote as to be highly unlikely.

Here, the facts hint at only a remote connection of Sharber's discipline with animus or union activity and it should be clear that the mere existence of past union activity by the alleged discriminatee does not serve to insulate a wrongdoer from an employer's routine disciplinary process. This is especially true when there is a countervailing general public policy and where an employer has a responsibility to exercise reasonable care to prevent and correct sexually harassing behavior. In view of Sharber's past harassing conduct, there is a substantial likelihood that he would continue that type of conduct unless he was given a final warning as discipline. The Respondent had the right to regulate repugnant conduct and the use of sexual vulgarisms in the workplace that creates a hostile work environment and the discipline imposed allowed Sharber a reasonable chance to bring his behavior into compliance with Respondent's rules and expectations.

It is noted that the Board has expressed concern over delays and the backing in pending case and has promoted a policy to prioritize cases, allocate resources, and efficiently process cases. Here, the further prosecution of this litigation has gener-

ated public testimony and further public humiliation of the harassed victim as well as a costly waste of the time and resources of the witnesses, the Employer, the Region, the Division of Judges, and the Board. This is wasteful, inefficient and inconsistent with Board policy and the fair administration of the Act and is unwarranted.

CONCLUSIONS OF LAW

1. Respondent PPG Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The complaint is dismissed in its entirety.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.